

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**





# 76-7233

**United States Court of Appeals  
FOR THE SECOND CIRCUIT**

Docket No. 76-7233

PRESSURE SCIENCE INCORPORATED,  
*Plaintiff-Appellant,*  
v.

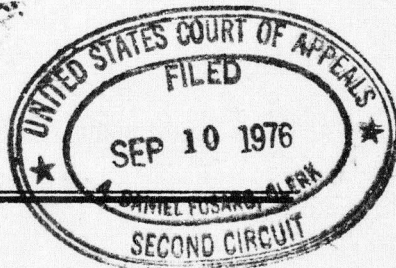
DAVID KRAMER and THE ADVANCED PRODUCTS COMPANY,  
*Defendants-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT

**BRIEF OF DEFENDANT-APPELLEE  
THE ADVANCED PRODUCTS COMPANY**

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#### Abbreviations Used

"JA"	refers to joint appendix.
"T"	refers to the trial transcript.
"APX"	refers to an Advanced Products exhibit.
"PX"	refers to a Pressure Science exhibit.

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**BRIEF OF DEFENDANT-APPELLEE  
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**PRELIMINARY STATEMENT**

The decision appealed from was rendered by Judge Robert C. Zampano. It has not been reported.

**STATEMENT OF ISSUES**

1. Is the district court's finding that the two-piece C-seal die was not a trade secret clearly erroneous?

**STATEMENT OF THE CASE**

**I.**

**Proceedings Below**

This action was commenced in December, 1973, by Pressure Science Incorporated ("Pressure Science"), a Maryland corporation having a principal place of business in Beltsville, Maryland. The action was brought against

David Kramer ("Kramer"), a former employee of Pressure Science, and Kramer's new employer, The Advanced Products Company ("Advanced Products"), a Connecticut corporation having its principal place of business in North Haven, Connecticut. The complaint contained three counts: two in unfair competition against Kramer and Advanced Products and a third in unjust enrichment against Kramer alone. Pressure Science is engaged in the manufacture of, among other things, metal seals. In its complaint, Pressure Science claimed to have a proprietary process for the manufacture of metal-C-rings. Pressure Science alleged that as a result of Advanced Products' employment of Kramer, Advanced Products had improperly appropriated trade secrets of Pressure Science relating to Pressure Science's manufacture of metal-C-rings. Pressure Science sought permanent injunctive relief against Kramer and Advanced Products, an accounting against Advanced Products for lost profits, compensatory damages against Kramer, and exemplary damages against Kramer and Advanced Products for their alleged malicious conduct.

Advanced Products' answer denied the allegations of Pressure Science's complaint and set forth two counterclaims. The first counterclaim alleged violations of Sections 1 and 2 of the Sherman Act. The second counterclaim alleged that Pressure Science's action against Advanced Products was brought without probable cause and was being maintained with the malicious intent of deterring Advanced Products from competing with Pressure Science in the manufacture of metal-C-rings. Advanced Products claimed compensatory damages in the amount of \$100,000, treble damages for violation of the antitrust laws, and exemplary damages for Pressure Science's malicious conduct.

By order dated March 11, 1975, the issues of liability and damages raised by the unfair competition counts were



separated pursuant to Rule 42(b). The court also severed the issues raised by the third count for unjust enrichment. Later, by agreement of the parties, Advanced Products' first counterclaim was separated for later trial. Accordingly, the trial dealt only with the liability issues raised in Pressure Science's unfair competition counts against Kramer and Advanced Products and the liability and damage issues raised by Advanced Products' second counterclaim for vexatious suit.

The case was tried before Judge Robert C. Zampano for twenty days during the period March 25, 1975, to May 7, 1975. Thereafter, proposed findings of fact and comprehensive briefs were submitted by the parties. Post-trial oral argument was held on September 16, 1975; on April 15, 1976, the court's memorandum of decision was filed. The court found that Pressure Science failed to sustain its burden of proof on its claims of unfair competition and that Advanced Products failed to sustain its burden of proof on its counterclaim for malicious prosecution; judgment was entered accordingly on April 19, 1976. The matter is now before this Court on an appeal filed by Pressure Science.

## II.

### Statement of Facts

#### A. Metal-C-Rings

Pressure Science and Advanced Products are engaged in the manufacture of special metal seals. Special metal seals are normally installed in a recess between two flanges in order to provide a leak-proof seal at the flange joint (JA 21a). The use of special metal seals has increased over the years with the development of machinery and equipment which require sealing under environmental conditions that exceed the capabilities of organic seals. For example,

rubber or other nonmetallic materials often cannot withstand extreme temperature, pressure, radioactivity, and corrosion. In such cases a metal seal is the best and, overall, the most economical solution. Special metal seals are commonly used today in the manufacture of aircraft, missiles, and nuclear reactor vessels (JA 21a).

For the most part, special metal seals are round, and they are manufactured in a variety of cross-sectional configurations including, among others, an "O" shape, a "V" shape, an "S" shape, a "C" shape, an "E" shape and a "K" shape (JA 21a). Metal seals of varying cross-sectional configurations may be used in the same application and, if used in the same application, the design parameters of the metal seals are the same (T 54, 84, 87-88, 370-74, 1188, 1265, 1313, 1350; APX-O; PX-8).

The manufacture of special metal seals involves a number of separate steps. In general, the manufacturing process consists of: (a) obtaining the desired seal shape (usually round with varying cross-sectional configurations); (b) welding the seal; (c) smoothing the weld upset; (d) sizing the seal; (e) polishing the seal surface; (f) heat treating the seal; (g) electroplating the seal; and (h) packaging the seal (JA 21a-23a, 29a, 35a). It was Pressure Science's contention at trial that its method of performing the foregoing steps in connection with the manufacture of metal-C-rings was a trade secret. The court found, however, that all concepts and techniques used by Pressure Science were known or used by others in the metal seal business and in the tool and die industry (JA 29a, 35a). The court, therefore, concluded that none of Pressure Science's manufacturing techniques constituted a trade secret. In its brief, Pressure Science limits its challenge to that portion of the court's findings relating to the two-piece die used to obtain the desired C-shaped cross-sectional opening.



## **B. Advanced Products**

Advanced Products has been engaged in the manufacture of special metal seals for over twenty years. The corporation was formed by Harvey R. Sommer ("Sommer"), a 1944 graduate of the Massachusetts Institute of Technology, Arthur Hostage ("Hostage"), a Yale graduate, and three other individuals. Sommer foresaw the increasing need for special metal seals and concentrated Advanced Products' early efforts on the manufacture of the classic metal-O-ring, one of the earliest special metal seals. Advanced Products was the first company to supply metal-O-rings to the nuclear reactor industry, and, from 1958 through 1967, Advanced Products supplied the world's requirements (T 1305-06). Advanced Products is the largest manufacturer of metal-O-rings in the United States and, according to Pressure Science, it has an excellent reputation for competence (JA 20a; T 1001-02). Today, in addition to the metal-O-ring, Advanced Products and its subsidiary in Aartselaar, Belgium, manufacture and sell many other special metal seals, including metal-V-rings and metal-C-rings (T 1183, 1296-97). In 1975, Advanced Products and its subsidiary had annual sales of approximately two million dollars (T 1295-96).

## **C. Advanced Products' Manufacture of Metal-C-Rings**

In the early 1970's Advanced Products manufactured metal-C-rings on a low volume basis in response to special customer orders (JA 22a, 247a-250a). The metal-C-rings initially manufactured by Advanced Products were made from metal-O-rings. An unfinished metal-O-ring was placed in a fixture and a portion of the surface of the ring was cut out. The machined metal-C-ring was thereafter finished using the same techniques Advanced Products used to finish its metal-O-rings. Once Advanced Products obtained the

desired C shape, the metal-C-ring was sized, polished, heat treated, electroplated and packaged in the same manner as a metal-O-ring (JA 22a, 29a, 62a, 247a-250a). In late 1972 or early 1973, Advanced Products became interested in producing metal-C-rings on a large volume basis. Advanced Products noted an increase in metal-C-ring sales activity, and a large number of Advanced Products' customers began to request quotations on a C configuration. Also, Advanced Products was advised by certain of its major customers that the metal-O-ring was not going to be considered for future design work (JA 26a-27a).

Metal-C-rings can be produced by machining bar or tubing or by forming metal strip into the desired C shape (T 43-44). When Advanced Products began to consider the manufacture of metal-C-rings on a large volume basis, Advanced Products knew it would have to change its method of manufacturing metal-C-rings (JA 26a-27a, 249a-250a, 292a-293a). Advanced Products recognized that it could not produce machined metal-C-rings at prices that were competitive with metal-O-rings or formed metal-C-rings (JA 26a-27a, 249a-250a, 295a-298a, 326a-328a). At the outset, Advanced Products, like Pressure Science, recognized that the only practical way to produce metal-C-rings on a large volume basis was by metal forming techniques (JA 27a, 250a-251a, 294a; T 677-78).

In early 1973, Advanced Products began to consider the various methods of producing formed metal-C-rings (JA 27a, 295a-296a, 249a-255a). Advanced Products' considerations were limited to the various methods of producing the desired C shape since the other eighty-five to ninety percent of the manufacturing process was already in existence at Advanced Products. Advanced Products recognized that once it obtained the desired C shape, the formed metal-C-

ring would be finished using the same techniques it used to finish its machined metal-C-rings (JA 27a-29a, 62a, 250a-260a, 296a-298a, 348a-349a).

Sommer and Bernard J. Sniegowski, an Advanced Products' engineer, recognized that there were a number of different ways to form metal-C-rings. Sniegowski had worked in the metal working industry for over twenty years and, on the basis of that experience, was familiar with metal forming practices (JA 27a, 39a, 290a-291a; T 1508-15). Sommer and Sniegowski considered and quickly discarded explosive forming, hydraulic forming, and spinning (JA 253a-254a; T 1682). Thereafter, their discussions covered four methods of forming: die forming, roll forming, rubber press forming, and compression between flats (JA 27a, 253a-255a; T 1694-95).

Prior to joining Advanced Products, Sniegowski had been chief engineer at D.S.D. Magnatech, another special seal manufacturer, and had extensive prior experience in the manufacture of formed metal seals (JA 39a, 62a). Under Sniegowski's direction, D.S.D. Magnatech had successfully formed metal-V-rings on a production basis using a split die with the V cross-sectional shape cut into the matching top and bottom halves of the die. Sniegowski also successfully formed metal-C-rings on an experimental basis at D.S.D. Magnatech. Like the V-seal, the C-seal was formed in a split metal die with the C cross-sectional shape cut into the matching top and bottom halves of the die. Neither the V-seal die nor C-seal die provided any internal support during forming. Moreover, the D.S.D. Magnatech C-seal die had stops cut into the cavity and the two halves were aligned by a single center dowel pin (JA 301a-305a; T 1570-72, 1598-99). According to Clive Diggins, a former D.S.D. Magnatech employee, D.S.D. Magnatech did not consider any of the techniques and tooling used to make



formed metal seals confidential or proprietary (JA 395a, 396a-397a).

In May, 1973, Sniegowski wrote a memorandum to Sommer summarizing the discussions that had taken place at Advanced Products concerning the various methods of producing formed metal-C-rings (JA 27a; APX-R). According to George Merwin, one of the two independent experts to testify at the trial, the memorandum is a good summary of the relevant metal forming considerations (JA 541a-545a). The memorandum, trial exhibit R, sets forth the methods Advanced Products presently uses to form metal-C-rings, including the use of a two-piece die with half the C shape in the top and half the C shape in the bottom (JA 27a, 31a-32a, 218a-220a, 262a-263a, 349a-350a, 354a-356a, 377a-378a, 541a-545a; APX-R).

#### **D. Advanced Products' Hiring of David Kramer**

In the spring of 1973, the most serious limitation on Advanced Products' entry into the metal-C-ring market on a large scale was the lack of available personnel to organize and supervise the effort (JA 44a, 260a-262a, 350a-351a). Around the middle of May, 1973, Sommer received a telephone call from David Kramer. Kramer identified himself as production manager for Pressure Science and told Sommer that he was interested in finding a new position. Kramer asked Sommer if Advanced Products was interested in interviewing him and, if so, whether Advanced Products wished him to come to its plant. Sommer told Kramer that he would call him back if Advanced Products were interested in inviting him to the plant for an interview (JA 20a, 28a-29a, 221a; T 1366). Following the telephone conversation, Sommer spoke to Hostage. While neither Sommer nor Hostage knew Kramer, they knew Pressure Science by reputation (T 1366, 2184-85).

Kramer was extremely attractive to Advanced Products. First, he had experience with the production of special metal seals, especially metal-C-rings. Second, he had management experience. At that time, Advanced Products was negotiating for the purchase of the B. G. Peck Company, a metal stamping house in Andover, Massachusetts. While Advanced Products did not have any presses in its Connecticut plant, it was Advanced Products' intention to use the B. G. Peck Company presses to die form its small to medium diameter metal-C-rings (JA 28a; T 1367-68, 2185-86, 2193).

Sommer and Hostage agreed to invite Kramer to Advanced Products for an interview. On May 22, 1973, Kramer was interviewed at Advanced Products. Kramer told Advanced Products that he was a graduate of the Massachusetts Institute of Technology and had a master's degree in metallurgy from Columbia University. Kramer related to Advanced Products the fact that he and Bernard Sadoff, Pressure Science's vice-president, did not get along, and, further, that Pressure Science would not permit him to pursue certain suggestions he had made to management. Kramer also related his duties as production manager at Pressure Science and his accomplishments with respect to productivity and personnel turnover at Pressure Science (JA 28a; T 1196-1200, 1368-73, 2185-88).

Advanced Products explained to Kramer its plans to expand its metal-C-ring production and the planned acquisition of the B. G. Peck Company. During the interview, Kramer expressed interest in managing the B. G. Peck Company and living in Massachusetts (JA 28a-29a; T 1196-1200, 1368-73, 2185-88).

Prior to the Kramer interview, Advanced Products recognized that its small to medium diameter metal-C-rings would be formed in a split die and its large metal-C-rings would be roll formed (JA 32a). While Sommer and

Kramer did not discuss the methods Pressure Science used to form its metal-C-rings, Sommer assumed Pressure Science was using the same conventional metal forming techniques Advanced Products had considered (T 1376-79, 1420-21, 2194-95).

Following the May 22, 1973 interview, Sommer and Hostage decided they were sufficiently interested in Kramer to invite him back for a second interview. During the May 22, 1973 interview, Kramer had told Advanced Products that his salary at Pressure Science was \$26,000 a year. Advanced Products did not feel it needed a permanent full-time project engineer for its metal-C-rings. Advanced Products, however, was optimistic about the B. G. Peck negotiations, and Advanced Products recognized that it would have to hire a full-time plant manager who was willing to live in the Andover area. Hostage and Sommer decided that they would speak to Kramer to determine whether he would be willing to move to Connecticut on an interim basis. If he were willing to do so, Advanced Products decided to offer him a job at \$22,000. Advanced Products recognized that it could not keep Kramer at \$26,000 a year if the B. G. Peck acquisition fell through, but it felt that it could squeeze by at \$22,000 a year if the acquisition negotiations were not successful (T 1200-04, 1371-73, 1381-83, 2188-92).

On June 1, 1973, Kramer again was interviewed at Advanced Products. At that meeting with Sommer and Hostage, Kramer agreed to move to Connecticut and to take interim housing until the B. G. Peck negotiations were completed. Advanced Products made an offer of employment at \$22,000 a year and Kramer accepted. All of Advanced Products' interviews with Kramer were typical of the interviews it had conducted in the past for similar positions (JA 28a-29a, 269a-270a, 385a).



Kramer was hired as a project engineer and was placed in charge of Advanced Products' metal-C-ring production (T 1208). Kramer's salary was comparable to other Advanced Products' employees on his level. In addition to his salary, Kramer was entitled to certain fringe benefits. Those benefits consisted of a group insurance program, a profit-sharing retirement program and an annual bonus. Advanced Products' bonus varies from \$200 to \$2,500. In 1973, Kramer received \$200, and in 1974, he received nothing (JA 29a; T 1207-08, 1387, 2191-93, 2178-79).

Following the arrival of Kramer at Advanced Products on June 18, 1973, Sommer, Sniegowski and Kramer discussed Advanced Products' plans to manufacture metal-C-rings on a large volume basis (JA 355a-361a; T 1388-92, 1767-68). During their conversations with Kramer, Sommer and Sniegowski did not learn anything about metal-C-ring forming techniques that had not been previously covered in their earlier conversations in the spring of 1973 (JA 355a-361a, 375a; T 1420). The two-piece metal die that Advanced Products presently uses to form small to medium diameter metal-C-rings is exactly the same type of split metal die Sniegowski had discussed with Sommer in the spring of 1973 and thereafter outlined in his memorandum, trial exhibit R, to Sommer (JA 27a, 32a 39a-40a, 43a, 354a-361a, 375a; APX-R; PX-72). Moreover, the two-piece die presently used by Advanced Products to form small to medium diameter metal-C-rings is the same as the split metal die Sniegowski had used to die form metal-C-rings some years earlier at D.S.D. Magnatech (JA 27a, 32a, 39a-40a, 43a, 362a-363a; APX-AC; PX-72).

#### **E. Pressure Science**

Pressure Science was originally formed in Maryland in December, 1959, under the name of High Pressure Engineering, Incorporated ("High Pressure") by Dudley Taylor

(T 657-58). At the time, Taylor was a full-time employee of the Naval Ordnance Laboratory ("N.O.L.") at White Oaks, Maryland. Two years earlier, in 1956, the N.O.L. had begun to use metal-C-rings as seals in various high pressure devices (T 663-64). Taylor felt that the metal-C-ring was an improvement to the classic metal-O-ring and formed High Pressure to manufacture and sell metal-C-rings (T 666-67).

The N.O.L. manufactured its metal-C-rings by machining solid bar or tubing (T 663, 666). As a result of his experience at the N.O.L., Taylor was aware that the machining of metal-C-rings was expensive and difficult. Taylor was also aware that he had to be able to manufacture metal-C-rings in small quantities at a reasonable price in order to compete in the special metal seal market. Thus, at the outset, Taylor began to produce the desired C shape by metal forming (T 666, 670-73).

Following the formation of High Pressure, Taylor continued to work at the N.O.L., initially for four days a week. Gradually over the next two years he reduced his commitment at the N.O.L. to one day a week (T 667).

From 1953 to 1960, High Pressure was housed in the cellar of Taylor's home in Beltsville, Maryland, and had no paid employees. High Pressure's initial investment in machinery and materials was approximately \$2,000. In 1960, High Pressure moved from Taylor's basement to a rented three-car garage in Beltsville, Maryland, and by 1960, High Pressure's investment in machinery and materials had risen to \$5,000 and it had one paid employee (JA 56a).

Little of Taylor's time at the N.O.L. was spent on metal-C-ring manufacture. When Taylor established High Pressure he knew little about the forming of metal-C-rings and metal-C-ring manufacture in general (T 800, 828-29). From



1958 to 1960, Taylor tried, on a part-time basis, various methods of obtaining the desired C shape by metal forming. For the most part Taylor worked alone except for some part-time help from two machinists. The closest metal seal company was 500 miles away, and very little metal work was done in the Beltsville area (JA 43a-44a, 57a).

In 1961, Taylor made a four-piece die to form metal-C-rings (JA 23a). The four-piece die consists of a top and bottom half with half the C shape cut into the cavity of each piece. The two halves are aligned by a center pin or post. The diameter of the center post is the same as the interior diameter of the metal-C-ring so that it acts as a stop for the metal-C-ring during forming. Also, there is a retainer ring which acts as a control of the outside diameter of the metal-C-ring during forming (JA 57a; T 709-10).

Since the center post of the four-piece die acts as a stop, it is scored or gouged during forming. In 1965, Charles Schossler, the Pressure Science machinist who was making the center posts, suggested that the stop be cut into the cavity of the die and the center post eliminated as the stop. The change suggested by Schossler, a high school graduate and toolmaker by training, also eliminated the need for the retainer ring. As a result of Schossler's suggestion Pressure Science made a two-piece die for its metal-C-ring forming (T 713-14, 817-22, 826, 963).

The two-piece die, like the four-piece die, consists of a matching top and bottom half with half the C cut into the cavity of each piece (T 711-14, 817-21; PX-35). The metal forming process in the four-piece die and the two-piece die is essentially the same. The basic difference between the dies is the lower cost of making the two-piece die (T 816-17). Both the four-piece die and the two-piece die are used today by Pressure Science in its metal-C-ring production (JA 57a; T 713, 808).

In 1961 Pressure Science also started to roll form metal-C-rings. Pressure Science uses roll forming for metal-C-rings twenty inches or larger in diameter since it is not practical to form large diameter metal-C-rings in dies. In some cases, Pressure Science also uses roll forming for an initial order or small order where the cost of making the die is not warranted (JA 24a; T 243-44, 736-39).

In addition to determining the manner in which he would form the C structure, Taylor also had to learn and to reduce to practice all other aspects of special metal seal manufacture. Pressure Science was new to the special metal seal business and Taylor spent considerable time designing the necessary equipment to weld, polish, heat treat, electroplate and otherwise finish the formed C structure (JA 43a-44a).

During the early 1960's Pressure Science did not experience any business growth and, in fact, its metal-C-ring sales declined. During this time, Pressure Science offered the metal-C-ring only in stainless steel, and the number of applications for the metal-C-ring began to decline rapidly. The temperature requirements for special metal seals were moving up, and other special metal seal manufacturers, including metal-O-ring manufacturers, were offering Inconel alloys (T 726, 731-32).

Beginning in 1965, Pressure Science began to offer metal-C-rings in the Inconel alloys (T 726-36). From 1968 to date, Pressure Science has grown substantially (T 175, 851). The metal-C-ring is responsible for Pressure Science's growth. The metal-C-ring has been the profitable branch of Pressure Science's business. For example, although the metal-C-ring accounted for only forty percent of Pressure Science's sales from 1971 through 1973, it accounted for one hundred percent of Pressure Science's profits through the same period. Until Advanced Products' recent entry into the metal-C-ring market, Pressure Science had an

exclusive position in that market (JA 42a; T 329-31, 359, 882-83, 1014, 1349-50).

It is anticipated that the metal-C-ring market will continue to grow substantially in the future. The metal-C-ring is made from strip which, relatively speaking, is very cheap and, in the smaller sizes, metal-C-rings are easier to weld than metal-O-rings. In quantity, the metal-C-ring can be produced for less money than the metal-O-ring. In recent years the metal-C-ring has gained acceptance and has replaced the classic metal-O-ring in a number of applications (JA 43a; T 87-88, 882-86, 1312-14, 2214).

#### **F. The Two-Piece Die**

Pressure Science does not claim that the fact that it uses a die to form metal-C-rings is a trade secret. Nor does Pressure Science claim that it would take a substantial period of time to make the die in question. Pressure Science's trade secret claim with respect to the die is limited to the claim that the die is so simple that no one would conceive of the idea of using such a simple die to make metal-C-rings.

It was Pressure Science's contention during the trial that a split metal die aligned by a single center dowel pin with half the C shape cut into the top half of the die and half the C shape cut into the bottom half of the die was a proprietary concept of Pressure Science. Specifically, Pressure Science claimed four things made the split die unique: first, the fact that half of the C image was cut into the top half of the die and half of the C image was cut into the bottom half of the die; second, the fact that a single center dowel pin was used to align the top and bottom halves of the die; third, the fact that the interior portion of the hoop was unsupported during the forming of the C shape; and fourth, the fact that there was a stop cut into each die cavity (JA 63a).



It was Pressure Science's position at trial that the split die was unique and that it would require an invention to duplicate it. According to Pressure Science, a tool and die maker would not think of such a simple die and, if asked to design a die to form metal-C-rings, a tool and die maker would design a much more complex and expensive die (JA 63a).

During the trial Advanced Products called two independent experts, Edward A. Barton and George Merwin. The trial judge found "both highly skilled specialists in the tool and die business" and gave "full credence to the testimony of [those] well-qualified, impartial witnesses" (JA 32a). Both experts testified that the die forming techniques used by Pressure Science were well-known and commonly used techniques in the tool and die industry. Addressing themselves to the specific claims of Pressure Science, both testified that they had extensive prior experience with unsupported forming and the use of stops to control the flow of metal in a die cavity. Also, both were familiar with the use of split dies where part of the finished image was cut into each half of the die and the two matching halves were aligned by a single center dowel pin (JA 32a-34a, 39a, 423a-431a, 505a-512a). While Barton and Merwin had never made a die to form a metal-C-ring, both testified without qualification that, if asked, their respective companies easily could have designed and made a die to form metal-C-rings in the spring of 1973 (JA 33a, 411a-413a, 494a-502a). In view of the anticipated low volume production, Barton and Merwin testified that they would have designed and made a simple two-piece "put and take" die which each of their companies had made many times in the past (JA 33a, 411a-413a, 494a-502a). Each independent expert testified that the die they would have made would have been almost identical to the die Pressure Science and Advanced Prod-

ucts currently use (JA 33a, 411a-418a, 495a-502a, 547a-548a). When asked by the court whether his conclusion to use a simple two-piece die was the result of his particular expertise, Mr. Barton replied that the solution was so elementary that he personally knew thirty or forty tool and die makers in Connecticut who, if asked to make a die to form metal-C-rings, would have made a similar die (JA 479a-481a).

**G. Pressure Science Failed To Take The Steps Necessary To Protect Its Alleged "Secret"**

The split die is simple, and, according to Pressure Science, it is the simplicity of the design that makes the die unique (JA 103a-110a). During the trial, Pressure Science admitted that the split die was so simple that if anyone saw the die open and the part before and after forming, he could go home and duplicate the die in a minute (JA 111a-112a).

While Pressure Science claimed that it considered its metal-C-ring manufacturing process proprietary and intended to protect that process from the outset, Taylor admitted that he never gave any thought to the possible ways of protecting that process (JA 155a-156a). The record in this case fully supports Taylor's apparent lack of concern.

During the trial, Pressure Science offered no evidence of security arrangements designed to protect its metal-C-ring manufacturing techniques. Indeed, the only evidence in the record clearly establishes that Pressure Science failed to take even the most elementary steps to protect this supposedly vital information.

Up to the time the action was brought, two large glass windows were located along the rear wall of Pressure Science's manufacturing area (JA 58a). Those windows provided an uninterrupted view of the manufacture of metal-

C-rings at Pressure Science, including the forming of hoops in split metal dies (JA 41a, 148a-150a; T 76-80, 87-90). Visitors, wanted and unwanted, had easy access to Pressure Science's manufacturing area (JA 123a; T 78, 92-93, 96-97). The employee entrance at Pressure Science opens into the manufacturing area and Pressure Science's only men's room is located in the manufacturing area (T 78, 96, 97). Pressure Science did not register visitors or employ a plant watchman (JA 123a; T 176). The only evidence of any attempt at physical security at Pressure Science was an ordinary burglar alarm system one would expect to find in a plant whether or not trade secrets were being protected.

Visitors, including suppliers, customer representatives and engineers, regularly entered the Pressure Science plant (T 99-105, 362-64, 465-66, 616-18). Many of those visitors took tours of the entire plant and saw the complete metal-C-ring manufacturing process (JA 41a; T 99-105, 465-66, 616-18). Tours were given while the plant was in production, and visitors saw the entire metal-C-ring manufacturing process in operation, including the forming of hoops in split metal dies (JA 41a; T 465-66, 616-18). Among the visitors who toured the plant were knowledgeable individuals who thereafter could have duplicated the process (JA 41a; T 366-67, 912-15). Prior to the tours, the visitors were not asked to sign a nondisclosure agreement and they were not advised that Pressure Science considered its metal-C-ring manufacturing process confidential (JA 151a-154a; T 368).

During the trial Pressure Science offered no proof that it attempted to limit access to the alleged secrets within its plant. Access to the metal-C-seal area was not limited to the employees working there. All Pressure Science employees were exposed to portions of the metal-C-ring manufacturing process (JA 40a-41a; T 76-80, 87-90, 92-93, 96-97, 351-54, 618-20).



While all of Pressure Science's employees were exposed to Pressure Science's metal-C-ring process, Pressure Science never advised any of those employees that it considered its metal-C-ring process a trade secret and that the information was not to be revealed to third persons (JA 26a, 40a-41a, 82a-89a; T 2584-2599, 2610). While Pressure Science had an employee agreement which contained a non-disclosure provision, prior to the commencement of this action only four persons at Pressure Science had executed that agreement. According to Pressure Science, the decision whether to request an employee to execute that agreement had nothing to do with the employee's knowledge of Pressure Science's metal-C-ring manufacturing process (JA 137a-146a; T 346, 595-97, 638-39). Of Pressure Science's approximately 380 former employees, none was asked to execute a nondisclosure agreement (JA 40a; T 351-54, 851-54).

Pressure Science's conduct at the time of Kramer's termination also demonstrates a total lack of concern over the protection of its alleged "secrets". In the spring of 1973, Pressure Science recognized Advanced Products as a competitor and, at the time of Kramer's termination, it was Pressure Science's understanding that Kramer had recently visited Advanced Products (JA 90a, 147a). Yet when Pressure Science fired Kramer, one of the company's most knowledgeable employees, it gave no consideration to having him sign a nondisclosure agreement (JA 87a-91a, 147a).

## ARGUMENT

## I

**The Record Contains Ample Evidence To Support The Trial Court's Finding That The Two-Piece Die Was Not a Trade Secret.****A. Scope of Review**

Rule 52(a) of the Federal Rules of Civil Procedure provides in part: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." The rule requiring an appellate court to make allowances for the advantages possessed by the trial court in appraising the significance of conflicting testimony has particular application where the trial court heard lengthy expert testimony and had an opportunity to visit the plant of one of the parties with counsel and observe the manufacturing process in question. *Graver Mfg. Co. v. Lynde Co.*, 336 U.S. 271 (1949). Where, as here, the contested findings are almost exclusively based upon oral testimony, such findings must not be reversed unless the Court "is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). In a case of this nature the contested finding may not be disregarded merely because some other rational inferences can be drawn from the undisputed facts. *Esso Standard Oil Company v. The SS. Kaposia*, 259 F.2d 486 (2d Cir. 1958). The trial court's findings are based upon facts which witnesses testified to during a lengthy trial and which, when all was said and done, the trial court chose to accept as true. Under such circumstances this Court should not substitute its judgment for that of the trial court.



## B. The Governing Law

There is no dispute that Connecticut law governs this diversity action. Connecticut, like most states, follows the Restatement approach to trade secrets. *Plastic & Metal Fabricators, Inc. v. Roy*, 163 Conn. 257 (1972). Citing the Restatement and *Town & Country House & Homes Service, Inc. v. Evans*, 150 Conn. 314 (1963), the trial court's memorandum of decision carefully analyzed each of the following factors in determining whether the information before it was a trade secret:

1. the extent to which the information is known outside the business;
2. the extent to which it is known by employees and others involved in the business;
3. the extent of measures taken by the employer to guard the secrecy of the information;
4. the value of the information to the employer and his competitors;
5. the amount of effort or money expended by the employer in developing the information; and
6. the ease or difficulty with which the information could be properly acquired or duplicated by others.

Without exception, the trial court concluded that Pressure Science's alleged "secret" did not satisfy the criteria of the Restatement. In the context of this appeal it is important to keep the foregoing in mind since Pressure Science's attack on the district court's conclusion that the two-piece die was not a trade secret ignores the fact that the court's opinion is premised on an analysis of each of the relevant criteria.

**C. The Trial Court's Finding That The Two-Piece Die Was Known Or Used By Others Is Not Clearly Erroneous.**

Pressure Science's brief states: "There was no evidence that anyone other than plaintiff and defendant Advanced Products ever used such a die." That simply is not true! Bernard Sniegowski testified at length about the split metal die he used some years earlier at D.S.D. Magnatech to form metal-C-rings on an experimental basis. Sniegowski also testified that the split metal die used by Advanced Products to form its small to medium diameter metal-C-rings was the same as the split metal die Sniegowski had used to die form metal-C-rings at D.S.D. Magnatech (JA 27a, 32a, 39a, 40a, 43a, 362a-363a; APX-AC; PX-72). It was the existence of such uncontroverted testimony that formed the basis for the trial court's finding that, prior to the hiring of David Kramer, Sniegowski possessed the knowledge and experience to implement the manufacture of metal-C-rings by utilizing a split metal die (JA 31a-32a).

Continuing its effort to discredit the trial court's findings, Pressure Science argues that the finding that the two-piece die was not a trade secret was premised on the imposition of a requirement of novelty in the patent sense. The short answer to this attack again is that it simply is not true! At the outset, the memorandum of decision recognizes *Plastic & Metal Fabricators, Inc. v. Roy*, 163 Conn. 257 (1972) and *Allen Mfg. Co. v. Loika*, 145 Conn. 509 (1958), as controlling, not *Sarkes Tarzian, Inc. v. Audio Devices, Inc.*, 166 F. Supp. 250 (S.D. Cal. 1958), *aff'd*, 283 F.2d 695 (5th Cir. 1960), *cert. denied*, 365 U.S. 869 (1961). (JA 36a-37a). The opinion also cites frequently *Sperry Rand Corp. v. Rothlein*, 241 F. Supp. 549 (D. Conn. 1964), in which Judge Anderson goes to great lengths to reject the patent-analogy theory of *Sarkes Tarzian* in favor of the holding

in *Allen Mfg. Co. v. Loika*. More importantly, the language of the opinion makes it clear that the trial court applied the proper standard. Pressure Science's trade secret claims were not rejected because of the absence of novelty in the patent sense but because "the die forming techniques used by Pressure Science and Advanced Products are well known and commonly used techniques in the tool and die industry" (JA 33a).

**D. The Trial Court Did Not Apply The "Good Mechanic" Defense.**

In the so-called "skilled mechanic" defense the defendant seeks to establish that the information is not entitled to protection since the secret consists of merely mechanical improvements which a good mechanic could make without resort to the alleged secret. The defense assumes two things: one, that a portion of the information is not generally known; and, two, that the information was obtained from plaintiff, but the defendant disputes that the information was of any value. See in that regard *Sperry Rand Corp. v. Rothlein*, 241 F. Supp. at 562. In the present action it is clear that the trial court never reached the issue of whether the so-called "skilled mechanic" defense came into play because it found that all aspects of Pressure Science's split metal die were common knowledge and, in any event, Advanced Products was in possession of all such knowledge prior to the hiring of David Kramer (JA 32a-33a, 39a, 43a, 45a). Here, unlike the facts in *Sperry Rand Corp. v. Rothlein*, *supra* at 560, there was extensive oral testimony "that the same piece of equipment, materials and procedures had been used in substantially the same way and for substantially the same purpose . . ." (JA 33a, 35a, 301a-305a, 355a-361a, 362a-363a, 375a; T 1570-72, 1598-99).



## II.

**The Record Contains Uncontroverted Evidence That Advanced Products Possessed The Knowledge To Produce Formed Metal-C-Rings Prior to The Hiring Of David Kramer.**

During the trial Sniegowski testified at length about his prior metal-C-ring experience at D.S.D. Magnatech, and how, based on that experience, he was aware that a simple split metal die with half the C in the top and half the C in the bottom could be used to form small to medium diameter metal-C-rings (JA 27a, 32a, 301a-305a, 362a-363a; T 1570-72, 1598-99). Moreover, Sommer testified that based on his discussions with Sniegowski in the early spring of 1973 he had decided to use a simple split metal die to form small to medium diameter metal-C-rings prior to the hiring of David Kramer (JA 32a, 39a, 252a-253a, 259a-260a, 264a-266a; T 1228-30). During the course of the trial, Sommer and Sniegowski also testified that the pace of Advanced Products' entry into the metal-C-ring market would have been approximately the same regardless of whether Advanced Products hired David Kramer since all the principles and concepts presently used by Advanced Products in its metal-C-ring production were known to the personnel at Advanced Products prior to May 15, 1973 (JA 44a-45a, 250a-260a, 296a-297a, 370a-372a, 373a-375a).

All the foregoing testimony was unshaken by cross examination, and it was the only testimony offered on the issue. Furthermore, Pressure Science's claim that Sniegowski's testimony about his prior D.S.D. Magnatech experience was vague and uncorroborated merits little attention. The testimony in question was developed in great detail and covered approximately a hundred pages of the trial tran-

script (JA 301a-331a). Also, while an appellate court should attach no significance to the absence of corroboration in any event (see, e.g., *Mycalex Corp. of America v. Pemco Corp.*, 159 F.2d 907 (4th Cir. 1947)), it is abundantly clear that none should be attached here. Obviously, Pressure Science could have examined Clive Diggins, a former D.S.D. Magnatech employee, on the point. Also, although Jack Emerson, the President of D.S.D. Magnatech and former immediate superior of Sniegowski at D.S.D. Magnatech, was subpoenaed by Pressure Science at the commencement of the trial, Pressure Science chose not to call him. If Pressure Science had any doubts about that testimony, why did it not call Emerson as a rebuttal witness?

Lastly, Pressure Science attacks the trial court's finding that Sniegowski possessed the knowledge and experience to die-form metal-C-rings on the ground that the evidence relied upon was legally insufficient. It suffices to note here that the cases at page 22 of Pressure Science's brief do not stand for the proposition cited. They are all patent cases and have nothing to do with the appropriate burden of proof in trade secret litigation.

### III.

#### **The District Court Found That The Two-Piece Die Was Not A Trade Secret And, In Any Event, All Such Information Was Fairly And Independently Obtained By Advanced Products.**

Assuming the two-piece die qualified as a trade secret, in order to prevail against Advanced Products, Pressure Science still had the burden of establishing that Advanced Products obtained that information by the use of improper means. *Schavoir v. American Re-Bonded Leather Co.*, 104

Conn. 472 (1926). Trade secret protection does not permit one to assert an exclusive property right in the information against the world. *Franke v. Wiltschek*, 209 F.2d 493 (2d Cir. 1953). Wrongful acquisition is an essential element of a trade secret action and no cause of action exists if the information was fairly and independently obtained. *Schavoir v. American Re-Bonded Leather Co.*, *supra*.

The remaining portion of Pressure Science's brief is devoted to an attack on the district court's opinion on the wrongful acquisition issue. Pressure Science's arguments, however, again miss the mark. As the district court properly noted at the outset of its opinion, "[t]he threshold issue in this case is whether a trade secret exists which is to be protected" (JA 36a). Following a careful analysis of the evidence the district court concluded that "Pressure Science does not possess a body of confidential and proprietary information with respect to its C-seal manufacturing process . . ." (JA 46a). Quite obviously if no trade secrets exists in the first instance, none can be improperly appropriated.

Assuming *arguendo* that the two-piece die did qualify as a trade secret, it remains clear that Pressure Science's argument on the wrongful acquisition issue is without merit. One cannot appropriate, wrongfully or otherwise, something within one's possession. In the present action the district court found that Advanced Products was aware that a split metal die could be used to form metal-C-rings prior to the hiring of David Kramer, that Advanced Products possessed the knowledge and experience to implement the manufacture of metal-C-rings by utilizing a split metal die prior to the hiring of David Kramer, and that Kramer's arrival on the scene merely expedited what was already a foregone conclusion at Advanced Products (JA 31a-32a, 44a).



In view of the fact that the district court found that the two-piece die was not a trade secret and, further, that Advanced Products was in possession of that information prior to the hiring of Kramer, it is evident that the district court's exclusion of evidence concerning a prior civil suit against Kramer cannot constitute reversible error. Even assuming the district court was incorrect in sustaining an objection on the ground that the evidence was too tenuous and remote, an appellate court will not reverse a decision on the mere possibility that the exclusion was harmful. *Fortunato v. Ford Motor Co.*, 464 F.2d 962 (2d Cir. 1972), *cert. denied*, 409 U.S. 1038 (1972). Where, as here, it is clear that the excluded evidence could not have affected the outcome of the case, under Rule 61 the ruling will be disregarded. *Jones v. Union Auto. Indemnity Association of Bloomington, Ill.*, 287 F.2d 27 (10th Cir. 1961).

### CONCLUSION

**For the reasons set forth herein the judgment of the district court should be affirmed.**

Respectfully submitted,

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*Attorney for Defendant-Appellee*  
*The Advanced Products Company*

Dated: September 10, 1976

WIGGIN & DANA  
195 Church Street  
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UNITED STATES COURT OF APPEALS  
For the Second Circuit

Docket No. 76-7233

Pressure Science Incorporated,  
Plaintiff-Appellant,

v.

DAVID KRAMER and THE ADVANCED  
PRODUCTS COMPANY,  
Defendants-Appellees.

Affidavit  
of  
Service by Mail

On Appeal from the United States  
Court for the District of  
Connecticut

STATE OF NEW YORK }  
COUNTY OF New York } ss.:

Thomas C. Reycraft , being duly sworn,  
deposes and says:

I am over the age of twenty-one years and reside at

668 Ely Avenue Pelham , in the

County of Westchester State  
~~County of~~ of New York. On the

10th day of Sept. , 1976 , at 3:30 o'clock pm,

I served 3 copies of the Brief of Defendant-Appellee  
The Advanced Products Company

in the above-entitled action on: each of the following parties:

Peter A. Kelly, Esq.  
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the attorney for the

in the said action, by depositing said copies, securely wrapped, properly addressed, and postage fully prepaid, in a post office box regularly maintained by the U. S. Government in the post office at 90 Church Street, in the Borough of Manhattan, City of New York.

Thomas C. Reynolds

Sworn to before me this  
10th day of Sept. , 19 76 }

Michael J. Hoops

MICHAEL J. HOOPS  
Notary Public, State of New York  
No. 30-4503056  
Qualified in Nassau County  
Commission Expires March 30, 1977